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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

DAVID MCKEW,)	No. C 07-3620 EDL
)	
Plaintiff,)	E-FILING CASE
)	
v.)	MOTION TO DISMISS
)	
SAN FRANCISCO MUNICIPAL)	Date: September 4, 2007
RAILWAY; UNITED STATES POSTAL)	Time: 2:00 p.m.
SERVICE; MELVIN WASHINGTON.)	Place: Courtroom E, 15 th Floor
)	
Defendants.)	

NOTICE OF MOTION

TO PLAINTIFF AND TO HIS ATTORNEY OF RECORD:

PLEASE TAKE NOTICE that on September 4, 2007, at 2:00 p.m., in the Courtroom of the Honorable Elizabeth D. Laporte, United States Magistrate Judge, Courtroom E, 15th Floor, United States District Court, 450 Golden Gate Avenue, San Francisco, California, the United States of America, represented by the United States Attorney for the Northern District of California, through Jonathan U. Lee, Assistant United States Attorney, will move this Court for an order dismissing the complaint against it pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure. The motion will be based on this motion and memorandum of points and authorities, any evidence offered in support of the motion including the Declaration of Gwendolyn E. Murray

1 , the arguments of the parties, and such other matters as may be presented to or considered by the
2 Court.

3 **RELIEF SOUGHT BY DEFENDANTS**

4 Defendant United States of America moves for dismissal without prejudice because the
5 plaintiff has not exhausted his administrative remedies, as required by the Federal Tort Claims
6 Act.

7 **ISSUE TO BE DETERMINED**

8 Whether plaintiff's action can proceed given his failure to exhaust administrative remedies.

9 **MEMORANDUM OF POINTS AND AUTHORITIES**

10 **I. STATEMENT OF FACTS**

11 On May 30, 2007, plaintiff David McKew filed his complaint in the San Francisco Superior
12 Court. The complaint alleges that the plaintiff was injured due in part to the negligence of an
13 employee of the United States Postal Service ("USPS") acting in the scope of his employment.
14 The complaint alleges that the plaintiff presented a claim as required by applicable claims
15 statutes (in the case of the USPS, the Federal Tort Claims Act ("FTCA")) and that the claim was
16 denied.

17 Plaintiff's claim against the USPS was made on February 9, 2007 and it remains open for
18 adjudication purposes. See Declaration of Gwendolyn E. Murray at ¶¶3-5.

19 **II. ARGUMENT**

20 **I. Standards Under Rule 12(b)(1)**

21 A Rule 12(b)(1) motion can either attack the sufficiency of the pleadings to establish
22 federal jurisdiction or challenge the substance of the jurisdictional allegations despite the formal
23 sufficiency of the complaint. Thornhill Publ. Co. v. Gen'l Tel. & Electronics Corp., 594 F.2d
24 730, 733 (9th Cir. 1979). Where defendant challenges the actual lack of jurisdiction, as in this
25 case, plaintiff's allegations are not presumed to be truthful, and plaintiff has the burden to prove
26 that jurisdiction exists. Tosco Corp. v. Communities for a Better Environment, 236 F.3d 495,
27 499 (9th Cir. 2001); Thornhill Publ. Co., Inc., 594 F.2d at 733. Plaintiff must do so by presenting
28 admissible evidence to satisfy his burden. Ass'n of Am. Medical Colleges, v. United States, 217

1 F.3d 770, 778 (9th Cir. 2000); St. Clair v. City of Chico, 880 F.2d 199, 201 (9th Cir.1989), cert.
 2 denied, 493 U.S. 993 (1989). Thus, the Court is presumed to lack subject matter jurisdiction
 3 until plaintiff proves otherwise. Stock West, Inc. v. Confederated Tribes, 873 F.2d 1221, 1225
 4 (9th Cir. 1989); Calif. Ex rel. Younger v. Andrus, 608 F.2d 1247, 1249 (9th Cir. 1979). In sum,
 5 plaintiff has the burden of proving jurisdiction in order to survive a motion to dismiss.

6 This Court can resolve factual disputes, if necessary, to determine whether jurisdiction
 7 exists. See, e.g., Dreier v. United States, 106 F.3d 844, 847 (9th Cir. 1997); Thornhill Publ. Co.,
 8 Inc., supra. “The district court obviously does not abuse its discretion by looking to this extra
 9 pleading material in deciding the issue [of subject matter jurisdiction] even if it becomes
 10 necessary to resolve factual disputes.” St. Clair, 880 F.2d at 201. The district court’s findings of
 11 fact must be accepted unless clearly erroneous. See, e.g., Ass’n of Am. Medical Colleges, 217
 12 F.3d at 778; La Reunion Francaise SA v. Barnes, 247 F.3d 1022, 1024 (9th Cir. 2000); United
 13 States ex rel Newsham v. Lockheed Missiles & Space Co., 190 F.3d 963, 968 (9th Cir. 1999),
 14 cert. denied, 530 U.S. 1203 (2000). Thus, it is error to treat a Rule 12(b)(1) motion as one for
 15 summary judgment, or apply summary judgment standards. Dreier, 106 F.3d at 847.

16 Here, plaintiff’s complaint must be dismissed because he has not shown that he has
 17 complied with the jurisdictional requirements for a tort action against the United States of
 18 America.

19 **B. The Court Lacks Subject Matter Jurisdiction.**

20 An action under the FTCA requires that the plaintiff first exhaust his administrative
 21 remedies. 28 U.S.C. § 2675(a) provides in pertinent part:

22 (a) An action shall not be instituted upon a claim against the United States for
 23 money damages for injury or loss of property or personal injury or death caused by
 24 the negligent or wrongful act or omission of any employee of the Government
 25 while acting within the scope of his office or employment, unless the claimant
 26 shall have first presented the claim to the appropriate Federal agency and his
 27 claim shall have been finally denied by the agency in writing and sent by certified
 28 or registered mail.

28 U.S.C. § 2675(a). “The claim requirement of section 2675 is jurisdictional in nature and may not be waived.” Burns v. United States, 764 F.2d 722 , 723 (9th Cir. 1985).

“Section 2675(a) establishes explicit prerequisites to the filing of suit against the Government in district court. It admits of no exceptions.” Jerves v. U.S., 966 F.2d 517, 521 (9th Cir. 1992). Where a plaintiff has not exhausted the administrative claims procedure required under the FTCA, plaintiff's complaint must be dismissed for lack of subject matter jurisdiction. McNeil v. United States, 508 U.S. 106 (1993). “28 U.S.C. § 2675(a) specifies that a suit may not be instituted against the United States unless it is first presented to the appropriate federal agency and either finally denied or permitted to languish for six months without resolution. This claim requirement is jurisdictional in nature and may not be waived.” Spawr v. United States, 796 F.2d 279, 280 (9th Cir. 1986).

Here, under the limited waiver of sovereign immunity in the FTCA, plaintiff cannot institute this action until six months have passed after the filing of his claim. Accordingly, his complaint must be dismissed for lack of subject matter jurisdiction.

III. CONCLUSION

Because the plaintiff has not met the prerequisites for bringing a Federal Tort Claims Act suit against the United States, the complaint must be dismissed without prejudice.

Respectfully submitted,

SCOTT N. SCHOOLS
United States Attorney

Dated: July 27, 2007

/s/ Jonathan U. Lee
JONATHAN U. LEE
Assistant United States Attorney